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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

NOAH BUTLER et al., Plaintiffs and Appellants, v. FIFTEEN MORTON LLC et al., Defendants and Respondents.	B299135 (Los Angeles County Super. Ct. No. BC700193)

APPEAL from a judgment of the Superior Court of Los Angeles County. Richard A. Rico, Judge. Reversed and remanded with directions.

Colleen O'Brien for Plaintiffs and Appellants.

Joseph Oliva & Associates, Joseph L. Oliva and Shervin Golshani for Defendants and Respondents.

Appellants Noah Butler and Colleen O'Brien (Appellants) are a married couple who purchased a residential lot from a developer, respondent Fifteen Morton LLC.[1] Appellants' lot was subject to an easement for several parking spaces belonging to a neighbor. The easement had some associated premises liability obligations.

Appellants told Fifteen Morton that they would not buy the lot if they had to assume these liability obligations. Fifteen Morton purported to fix this problem by enacting an amendment (the First Amendment) to the development's covenants, conditions, restrictions and reservation of easements (CC&R's). The First Amendment obligated the development's homeowners association (Association) to defend and indemnify Appellants for losses relating to the easement. Fifteen Morton also included a provision in its purchase agreement with Appellants warranting that the Association "is obligated to indemnify" Appellants from liability relating to the easement "in accordance with" the First Amendment.

After Appellants purchased their lot, the Association denied any indemnification responsibility and then changed the CC&R's to revoke the First Amendment. Appellants sued Fifteen Morton for breach of the warranty and for fraud. Fifteen Morton successfully demurred; Appellants filed a First Amended Complaint (FAC); and Fifteen Morton demurred again.

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[1] Respondents are Fifteen Morton LLC, Van Daele Development Corporation, Van Daele Homes, Inc., Michael Van Daele and Jeffrey Hack, all of whom are alleged to have acted together as partners or agents. We refer to respondents collectively as "Fifteen Morton."

The trial court sustained Fifteen Morton's demurrer without leave to amend. The trial court concluded that Appellants did not allege facts showing that Fifteen Morton was responsible for the Association's revocation of the First Amendment, and that Appellants' fraud claim lacked specificity.

We reverse. The warranty that Fifteen Morton provided is reasonably susceptible to the interpretation that the Association would be *permanently* obligated under the CC&R's to indemnify Appellants for liability relating to the parking easement. Contrary to that warranty, the Association actually had the right under the CC&R's to revoke the First Amendment, and later did so. Thus, Appellants have sufficiently alleged claims based upon breach of the warranty.

While we agree with the trial court that Appellants' fraud claim is not pleaded with sufficient particularity, Appellants have identified facts that, if pleaded, would be sufficient to support that claim. Appellants must therefore be given an opportunity to amend the fraud claim on remand.

BACKGROUND

1. Appellants' Allegations

Appellants purchased a residential lot (Lot 18) from Fifteen Morton in a residential development known as Morton Village.

After Appellants had entered into a purchase agreement for the lot in March 2015 (the Purchase and Sale Agreement), they discovered that Lot 18 and all the other lots in the development were subject to a parking easement in favor of a neighboring property (the Easement). The Easement was for a two car parking space located entirely on Lot 18. The parking and access agreement establishing the Easement (the P/A Agreement) also

created various premises liability obligations that Appellants would be required to assume.

After discovering the existence of the P/A Agreement, Appellants told Fifteen Morton that they "could not complete the purchase of Lot 18 if [Appellants] had to assume the successor liabilities and premises liability obligations" that the agreement established. In response, Fifteen Morton first told Appellants that the Easement owner was willing to amend the P/A Agreement to relieve Appellants from any obligations. Shortly before closing escrow on Lot 18 in late 2015 or early 2016, Appellants discovered that representation was false.

Appellants remained concerned about possible premises liability associated with the Easement and repeatedly expressed their concerns to Fifteen Morton. In response to those concerns, Fifteen Morton added the First Amendment to the CC&R's to create a "Defense and Indemnity" provision. The First Amendment promised that "[t]o the fullest extent permitted by law, Association shall defend, indemnify, and hold each Owner, harmless from and against any and all loss, expense, liens, claims, liabilities, obligations, judgments, demands, and causes of action of every kind and character whatsoever, including, but not limited to, death, personal injury, damage to property, repairs and third party fines or penalties, including costs, attorneys' fees, and settlements (hereinafter collectively referred to as 'Claims'), arising out of or in any way connected with, or alleged to be arising out of or connected with, or related to the [Easement], whether or not Association is proven to be at fault or is negligent, in whole or in part, or whether such Claims are as a result of acts or omissions of Association, including work which is performed by

Association, or by any independent contractor, or by any agent, employee, invitee, or licensee of the Association."

Fifteen Morton also amended its Purchase and Sale Agreement with Appellants to provide its own indemnification warranty (the Warranty). Fifteen Morton's Warranty stated that "Seller represents and warrants that the homeowners association for Morton Village is obligated to indemnify Buyer from any liability relating to the Easement Agreement . . . in accordance with the first amendment to the CC&R's for Morton Village." In this same amendment, Fifteen Morton agreed to reduce Appellants' purchase price for Lot 18 by $10,000 and to reimburse Appellants $8,000 for "rent, storage and legal expenses."

Without the Warranty, Appellants would not have closed their purchase of Lot 18. After receiving the Warranty, Appellants agreed to the deal and they acquired Lot 18 on February 26, 2016.

About five weeks after the closing, a moving van that was using the parking spaces on Lot 18 struck Appellants home, causing damage. Appellants reported this event to the Association. The Association's Board "informed [Appellants] the Association did not know about and would not honor the First Amendment to the CC&Rs." Then, on or around June 20, 2017, the Association revoked the First Amendment.

2. Proceedings in the Trial Court

Appellants filed their initial complaint on April 2, 2018. Fifteen Morton demurred on a number of grounds, including that Appellants' claims were premature and therefore not ripe.

The trial court sustained the demurrer on that ground. The court reasoned that the crux of Appellants' complaint was

that Appellants were denied indemnification rights, but the complaint failed to allege "any claim or suit or that [Appellants] have incurred damages." The trial court gave leave to amend.

Appellants filed their FAC on October 24, 2018, alleging causes of action for (1) declaratory relief; (2) breach of contract; (3) breach of the implied covenant of good faith and fair dealing; (4) breach of warranty; (5) unjust enrichment; and (6) fraud. Fifteen Morton again demurred to each of these causes of action, except for Appellants' first cause of action for declaratory relief.

The trial court sustained the demurrer, this time without leave to amend. The court concluded that Appellants' breach of contract claim "alleges insufficient facts and remains confused." The court explained that the wrongful conduct that Appellants alleged appeared to be the revocation of the First Amendment, but the "FAC does not explain how Defendants were responsible for this action or how this resulted in damages to [Appellants]." The court found that Appellants' causes of action for breach of the covenant of good faith and fair dealing and breach of warranty simply mirrored the breach of contract claim and were insufficient to state a claim for that reason. With respect to the remaining claims, the court ruled that there is no separate cause of action for unjust enrichment under California law and found that Appellants' fraud claim lacked specificity.

Following this ruling, Appellants dismissed their first cause of action for declaratory relief "without prejudice" to obtain the equivalent of a final judgment for purposes of appeal. (See *Gutkin v. University of Southern California* (2002) 101 Cal.App.4th 967, 974–975.) Appellants then appealed.

DISCUSSION

1. Standard of Review

We review de novo the trial court's ruling sustaining Fifteen Morton's demurrer. (*King v. CompPartners, Inc.* (2018) 5 Cal.5th 1039, 1050.) We " 'treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.' " (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

The allegations in the FAC "must be liberally construed, with a view to substantial justice between the parties." (Code Civ. Proc., § 452.) "We have the power, as a reviewing court, to disregard the 'mislabeling' of causes of action, where supported by the record." (*Hernandez v. Lopez* (2009) 180 Cal.App.4th 932, 938 (*Hernandez*).)

We review the court's decision not to permit further amendment for abuse of discretion. (Code Civ. Proc., § 472c, subd. (a); *Ellenberger v. Espinosa* (1994) 30 Cal.App.4th 943, 947.) If the FAC does not state facts sufficient to constitute a cause of action, we must determine whether there is a reasonable possibility that the defect can be cured by amendment. (*Ellenberger*, at p. 947.)

2. Appellants' Causes of Action are Ripe for Adjudication

Echoing the trial court's ruling in sustaining Fifteen Morton's demurrer to Appellants' original complaint, Fifteen Morton contends that Appellants' causes of action are not ripe for adjudication because there has not yet been any claim against Appellants relating to the Easement. In essence, Fifteen Morton argues that Appellants do not have an actionable claim because they have not been injured, and may never be injured, by the

conduct described in their FAC. (See *Jaffe v. Albertson Co.* (1966) 243 Cal.App.2d 592, 616 ["the rights of the parties must be judged by conditions existing at the time the suit is commenced"].)

In response, Appellants claim that they have suffered injury in a number of ways, including: (1) diminished value of Lot 18; (2) more expensive insurance; and (3) attorney fees they incurred in asserting their contractual right to be indemnified by the Association before the Association revoked the First Amendment. We need not consider all of these various claimed elements of loss, as we agree that Appellants have adequately alleged that the absence of an indemnification obligation by the Association has decreased the value of their Lot 18. (See *Saunders v. Cariss* (1990) 224 Cal.App.3d 905, 908 ["Our task is to determine whether the pleaded facts state a cause of action on any available legal theory"].)

Appellants allege that they purchased Lot 18 in reliance on an enforceable commitment by the Association to indemnify them for claims that might be asserted against them relating to the Easement. One may reasonably infer from the allegations in the FAC that such a commitment has value to the owner of the lot. Indeed, Appellants allege that they were not willing to purchase Lot 18 if they had to assume the premises liability obligations in the P/A Agreement. If the Association's indemnification commitment had value, it is reasonable to conclude that its absence diminished Lot 18's worth.

Fifteen Morton argues that this claimed loss of value is "speculative." But Appellants were not required to allege evidentiary facts in their FAC. Appellants allege that Fifteen Morton's "breaches and fraud" diminished the value of their

property and stated facts in the FAC sufficient to support that allegation. Nothing more was necessary to overcome Fifteen Morton's demurrer. (See *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 496 [a general demurrer admits the truth of all material factual allegations in the complaint, and "the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court"].)

Fifteen Morton also argues that whether the value of Lot 18 has actually decreased depends upon the outcome of Appellants' declaratory relief cause of action.[2] Fifteen Morton reasons that, if Appellants were to prevail in their interpretation of the Warranty, they would "obtain the indemnification they seek from Fifteen Morton." If Fifteen Morton were to prevail, the issue would be moot.

The argument is unpersuasive. Fifteen Morton is correct that, if Appellants were to prevail on their declaratory relief claim, they would establish the right to seek compensation from Fifteen Morton based on the Warranty in the event of a claim against them relating to the Easement. However, that right does not have the same value as a binding indemnification commitment by the Association in the CC&R's.

Fifteen Morton's Warranty was a contractual commitment given by a developer to Appellants personally. In contrast, the First Amendment was an obligation assumed by the Association

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[2] Fifteen Morton does not address the effect of Appellants' dismissal of their declaratory relief claim "without prejudice" on Appellants' ability to reassert that claim if we were to affirm the trial court's ruling and bring this action to an end. In light of our disposition of the appeal, neither do we.

and recorded in the CC&R's. That obligation would also allegedly be owed to future owners of the lot. Thus, the First Amendment would have some value to a future purchaser of the lot; Fifteen Morton's Warranty to Appellants would not.[3] A purchaser would not pay for value that he or she did not receive. Thus, Appellants have plausibly alleged that Fifteen Morton's breach of its Warranty decreased the value of Lot 18 even if Appellants would have the right to seek indemnification from Fifteen Morton in the event of future claims against them.

Fifteen Morton is also correct in claiming that, in the event Appellants do not prevail on their interpretation of the Warranty, their claim for damages would be moot. But that is the same as saying that Appellants will not be entitled to recover if they lose. Fifteen Morton does not cite to any authority establishing that Appellants are required to prevail on a declaratory relief claim before seeking damages for breach or fraud. Such a rule would be both inefficient and inconsistent with res judicata principles.

3. The FAC Adequately Alleges Causes of Action Arising from Fifteen Morton's Alleged Breach of the Warranty

a. *The language of the Warranty can reasonably be interpreted to support Appellants' claims*

Fifteen Morton's primary argument concerning each of Appellants' contract-related claims (Appellants' second through fifth causes of action) is that Fifteen Morton could not control the

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[3] Nothing in the Warranty indicates that it was assignable to future purchasers of Lot 18, and Fifteen Morton does not argue that it was assignable.

future conduct of the Association. Fifteen Morton argues that, consistent with its Warranty, the First Amendment *did* obligate the Association to indemnify Appellants at the time Fifteen Morton executed the Warranty. That obligation continued until the Association later revoked the First Amendment. Fifteen Morton claims that, pursuant to the CC&R's and the governing law, it had lost control over the Association by that time.

Fifteen Morton argues that it made no contractual commitments concerning what the Association might do after Fifteen Morton no longer controlled it. Thus, the Association's subsequent decision to revoke the First Amendment was not Fifteen Morton's responsibility, and Appellants' remedy, if any, must be against the Association.

However, the relevant question is not what Fifteen Morton could control, but rather what it *warranted*. Fifteen Morton's argument assumes that the parties meant to limit the Warranty only to the time period during which Fifteen Morton controlled the Association. While possible, that is not the only reasonable interpretation of the Warranty.

In reviewing an order sustaining a demurrer to a contract claim, we must accept any alleged interpretation of the contract that is reasonable. "Where a complaint is based on a written contract which it sets out in full, a general demurrer to the complaint admits not only the contents of the instrument but also any pleaded meaning to which the instrument is reasonably susceptible." (*Aragon-Haas v. Family Security Ins. Services, Inc.* (1991) 231 Cal.App.3d 232, 239; see *Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 229.) In considering whether an alleged interpretation of a contract is reasonable, a reviewing court must also consider allegations concerning the

parol evidence that would be relevant to interpreting the contract. (*George v. Automobile Club of Southern California* (2011) 201 Cal.App.4th 1112, 1128.)

The FAC pleads that the parties intended the Warranty to mean that "the Association was obligated to indemnify and defend [Appellants] in perpetuity." In light of the allegations in the FAC, that interpretation is reasonable.

The FAC alleges that Appellants repeatedly told Fifteen Morton that they were seeking complete protection against the possibility of claims against them relating to the Easement. For example, Appellants allege that "over the course of 2015, [Appellants] had multiple conversations with agents and employees of [Fifteen Morton], including but not limited to Joanna Sanchez ('Sanchez') and Craig Smith ('Smith'). During these conversations [Appellants] repeatedly emphasized they could not complete the purchase of Lot 18 if [Appellants] had to assume the successor liabilities and premises liability obligations under the existing P/A Agreement." Appellants allegedly told Smith and Sanchez that they "did not want to assume *any obligations* as a result of [Fifteen Morton] having devised and entered into the P/A Agreement." (Italics added.) The FAC alleges that Fifteen Morton recorded the First Amendment "in direct response to [Appellants'] concern about the P/A Agreement."

The FAC also alleges that Appellants' continuing concern about liability relating to the Easement led to the Warranty. "As the prospective owners of Lot 18 and the fee interest underlying the P/A Agreement's . . . Easement, [Appellants] were justifiably concerned about premises liability and other types of liabilities and harms that could befall them and their Property as a result

of the *permanent* and exclusive . . . Easement being located entirely on their lot. [Appellants] repeatedly expressed those concerns to [Fifteen Morton]." (Italics added.) Appellants claim that, "in direct response to this concern, and for valuable consideration," Fifteen Morton provided the Warranty.

Because the Easement is permanent, it was logical that Appellants would seek a permanent indemnification obligation. The FAC alleges that Appellants told Fifteen Morton that they would not purchase the lot without complete protection from potential liability related to the Easement. Fairly understood in light of the FAC's allegations, complete protection meant *permanent* protection. It is therefore reasonable to conclude that Appellants understood that is what the Warranty provided.

The language of the Warranty is susceptible to that interpretation. The Warranty does not impose any temporal limitation on its guarantee and does not mention the possibility that the Association could later decide to revoke its indemnification commitment. The Warranty does use the present tense in stating that the Association "is obligated" to indemnify under the First Amendment. But the First Amendment itself uses contract language in stating that "[t]o the fullest extent permitted by law, Association shall defend, indemnify, and hold each Owner, harmless from and against any and all loss . . . ." Ordinarily, a party that enters into a contract expects that, absent an explicit term in the contract to the contrary, the other contracting party will be bound by its contractual commitment and will not have the unilateral power to abrogate that commitment.

A careful analysis of the entire CC&R's in light of the controlling law would have revealed that, under article XII, the

Association had the right to amend the CC&R's through a sufficient vote by the owners. Such an analysis would also have disclosed that Fifteen Morton's control over the Association would end, at the latest, three years "after completion of the project evidenced by the first conveyance of a Lot to a purchaser."

However, the CC&R's contain a long, complicated set of provisions. For example, as explained in the FAC, the CC&R's state that "[a]ll of the limitations, covenants, conditions, restrictions, and easements shall constitute equitable servitudes in accordance with Civil Code Section 5975 and shall be binding upon Declarant and its successors and assignees, and all parties having or acquiring any right, title or interest in or to any part of the Property." Civil Code section 5975 states that "[t]he covenants and restrictions in the declaration [i.e., the CC&R's] shall be enforceable equitable servitudes, unless unreasonable, and shall inure to the benefit of and bind all owners of separate interests in the development."[4] On their face, and without considering the CC&R's amendment procedures, these provisions seem to suggest that the Association's indemnification obligation would be permanent and would run with the land.

The governing law is just as complicated. The CC&R's state that the property to which the CC&R's restrictions apply is not subject to the Davis-Sterling Common Interest Development Act (the Act, § 4000 et seq.), of which section 5975 is a part. However, the CC&R's also state that because the property is governed by a homeowners association, the "Declaration," (i.e., the CC&R's) therefore "incorporates or cites many of the

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[4] Subsequent undesignated statutory references are to the Civil Code.

provisions of that Act pertaining to the operation of homeowners associations." Section 4270, which is also part of the Act, states that a declaration may be amended "pursuant to the declaration or this act." (§ 4270, subd. (a).) But article XII of the CC&R's, which contains the amendment provisions, does not refer to section 4270.[5]

In light of this complicated collection of governing rules, and under the allegations in the FAC, it is reasonable to conclude that Appellants bargained for the Warranty to obtain assurance from Fifteen Morton (the drafter of the First Amendment) that it had bound the Association to a permanent indemnification obligation. It is also reasonable to conclude that Fifteen Morton understood that it was warranting such a permanent obligation to indemnify and that it accepted the risk that the Association might later seek to revoke that obligation.[6]

Even if Fifteen Morton intended to warrant the Association's indemnification obligation only during the time that it controlled the Association, the allegations of the FAC are sufficient to support a theory that Fifteen Morton knew that *Appellants* had a different understanding. A party who enters into a contract knowing that the other party has a particular

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[5] Article XII also confusingly states that "Article XIV concerns amendments to the Declaration." Article XIV is an attorney-in-fact provision which, among other things, gives the declarant (i.e., Fifteen Morton) the broad power to "do any and all things necessary or desirable under the circumstances to effect and accomplish development of the Property."

[6] Such an assumption of risk would be similar to the risk assumed by a person who guarantees repayment of a loan or who provides a bond guaranteeing the performance of another.

understanding of its meaning may be required to accept the other party's interpretation. (See § 3399 ["When, through . . . a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of the party aggrieved, so as to express that intention"]; *Stare v. Tate* (1971) 21 Cal.App.3d 432, 438 ["The law . . . estops the party who knows of the plaintiff's mistake from claiming that his intent differs from what he leads the other to believe it is"].) Although Appellants have not requested the remedy of contract reformation, the alleged facts could support such a theory. (See *Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1162 ["we exercise our independent judgment as to whether a cause of action has been stated under any legal theory when the allegations are liberally construed"].)

b. *Fifteen Morton's arguments concerning Appellants' specific contract claims do not support reversal*

In addition to its control argument, Fifteen Morton makes several specific arguments concerning Appellants' contract-related causes of action. None of those arguments shows that Appellants have failed to state a claim.

First, Fifteen Morton argues that Appellants' third cause of action for breach of the covenant of good faith and fair dealing is "merely a restatement of the breach of contract claims" and therefore does not state a separate claim. " 'Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement.' " (*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 371, quoting Rest.2d Contracts, § 205.) This covenant of

good faith "finds particular application in situations where one party is invested with a discretionary power affecting the rights of another. Such power must be exercised in good faith." (*Marathon,* at p. 372.) A claim based upon the breach of the covenant of good faith and fair dealing is "superfluous" when it does no more than allege the breach of an actual contract term. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 352.)

Appellants' claim for breach of the covenant does not simply allege a breach of contract. Rather, Appellants allege that Fifteen Morton engaged in bad faith conduct that made loss of the Association's indemnification commitment more likely.

Appellants allege that Fifteen Morton: (1) failed to "timely disclose the liabilities and obligations of the P/A Agreement to the Association, and its members;" and (2) failed to "take reasonable and necessary steps within Developer Defendants' exclusive control to ensure [Appellants] received the benefits of [the Warranty] and the First Amendment to the CC&Rs." Although these allegations are general, when read liberally they support a theory that Fifteen Morton acted in bad faith in failing to timely and completely disclose the risks associated with the Easement and the First Amendment's indemnification obligations to new lot owners who would have a vote in the Association. The allegations also are sufficient to support a theory that Fifteen Morton failed to draft the First Amendment in a manner that would preclude future revocation by the Association.[7]

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[7] Section 12.01(f) of the CC&R's provides that no amendments may be made to provisions "which specifically

Second, with respect to Appellant's fifth cause of action, Fifteen Morton argues that unjust enrichment is a remedy rather than a claim, and that, in any event, Appellants' unjust enrichment claim asserts no separate theory of recovery. However, unjust enrichment can be synonymous with the remedy of restitution. (*Hernandez, supra,* 180 Cal.App.4th at pp. 938–939.) Unjust enrichment may therefore constitute an alternative remedy when breach of a valid contract cannot be proved. (*Id.* at p. 939.)

Appellants allege fraud that induced them to enter into the Purchase and Sale Agreement. Thus, their cause of action for unjust enrichment can fairly be read to allege an alternative claim for restitution following rescission of the Purchase and Sale Agreement for fraud.

4. Appellants Must Be Given An Opportunity to Amend to State a Claim for Fraud

a. *Appellants' cause of action for fraud is not pleaded with sufficient particularity*

As the trial court noted, a claim for fraud must be pleaded with specific facts supporting each element of the claim. (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 216–217.) Thus, a cause of action for fraud must be supported by factual allegations showing that the

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benefit" Fifteen Morton "as developer" without Fifteen Morton's consent. The parties dispute whether Fifteen Morton could have invoked this provision to prevent the Association's revocation of the First Amendment. At a minimum, this section shows that Fifteen Morton was able to assert some control over the future conduct of the Association through the manner in which it drafted the CC&R's.

defendant made a knowing misrepresentation with the intention to induce reliance. (*Seeger v. Odell* (1941) 18 Cal.2d 409, 414.) And the plaintiff must have justifiably relied on that misrepresentation. (*Ibid.*)

Appellants have not sufficiently alleged facts supporting these elements of their fraud claim. Appellants allege that Fifteen Morton made several false statements that Appellants discovered were false before they relied upon them. For example, Appellants allege that Fifteen Morton offered an indemnity through Fifteen Morton LLC during a time that entity was "canceled." But Appellants do not allege that they relied on this offer; indeed, they claim that they "pointed out this deceit" to Fifteen Morton. Appellants also allege that Fifteen Morton made false statements concerning the Easement owner's willingness to execute an amendment to the P/A Agreement relieving Appellants from any obligations relating to the Easement. But Appellants allege that they discovered those statements were false before escrow closed.

Appellants' primary fraud theory is that Fifteen Morton's representation in the Warranty was false. However, as pleaded, the Warranty alone cannot support Appellants' fraud claim.

As discussed, Fifteen Morton warranted that the Association "is obligated" to indemnify Appellants for liability related to the Easement. At the time Fifteen Morton made that representation, the First Amendment was in effect. Appellants have not alleged that the First Amendment was unenforceable.[8]

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[8] The FAC alleges that the Association refused to honor the First Amendment while it was in effect, but does not claim that

Thus, Fifteen Morton's representation that the Association was obligated to indemnify Appellants was true at the time it was made.

As discussed above, the FAC generally alleges communications supporting the conclusion that Fifteen Morton represented that the Association's indemnification obligation would be permanent. However, specific alleged facts concerning these communications are necessary to support a claim for fraud.

Appellants suggest that such facts exist. For example, Appellants claim in their briefs that respondent Van Daele and his agent "stated on several occasions that the First Amendment . . . 'is sufficient to protect you.' " Appellants also assert that Fifteen Morton made similar representations to them at "various times throughout 2015 and 2016."

Appellants claim that these representations occurred in a context in which Fifteen Morton intended to mislead them. Appellants assert that, on several occasions in late 2015/early 2016 prior to the closing, "Respondents, having been made aware of Appellants' concerns, represented to Appellants that the First Amendment to the CC&Rs was sufficient to protect Appellants from their liability and diminution in value concerns . . . . Respondents did not inform Appellants the First Amendment to the CC&Rs was revocable at any time by the Association . . . . At the time of closing, Appellants believed Respondents had the ability to warranty [*sic*] the First Amendment to the CC&Rs in

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the Association had the right to do so. Rather, the FAC alleges that the First Amendment was a " 'Governing Document' within the meaning of [sections] 4150 and 5975, that purported to create and provide for an equitable servitude under the CC&Rs and was *binding on the Association* and [Fifteen Morton]." (Italics added.)

perpetuity . . . . Respondents did not inform Appellants they instead believed they did not have that ability, and instead believed the [Warranty] was worthless after the Association assumed control." In their briefing in the trial court, Appellants further explained that the persons making these alleged statements were Respondent Van Daele and Fifteen Morton employee Eric Scheck.

If, as Appellants have represented to this court and the trial court, authorized agents of Fifteen Morton told Appellants that the First Amendment was sufficient to meet their concerns for a reliably *permanent* solution to the problem of liability relating to the Easement, Appellants can state a claim for fraud. Appellants must support their claim with alleged facts showing "how, when, where, to whom, and by what means" these statements were made. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645.)

If there is a "reasonable possibility" that a defect in a complaint can be cured by amendment, a demurrer should not be sustained without leave to amend. (*Minsky v. L.A.* (1974) 11 Cal.3d 113, 118.) Because the trial court sustained Fifteen Morton's demurrer to the original complaint on ripeness grounds only, Appellants were not apprised of the need to amend their fraud claim before it was dismissed. Appellants have represented that facts exist that will support that claim. Under these circumstances, Appellants must be given an opportunity to amend the FAC to attempt to state a claim for fraud.

DISPOSITION

The judgment of dismissal is reversed. The trial court's order sustaining Respondents' demurrer without leave to amend the first amended complaint is reversed. The matter is remanded to the trial court with directions to (1) enter an order overruling the demurrer to the second, third, fourth, and fifth causes of action, and (2) enter an order sustaining the demurrer to the sixth cause of action (fraud) with leave to amend. Appellants are entitled to their costs on appeal.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

ASHMANN-GERST, J.

HOFFSTADT, J.